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NO. 85-2168

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JAMES N. FLEMING,

Petitioner,

v.

W. BEDFORD MOORE, III,

Respondent.

On Writ of Certiorari
to the Supreme Court of Virginia

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does this Court have jurisdiction to consider the issues raised in Petitioner's questions 1, 3 and 4 when those issues were decided by the Supreme Court of Virginia in June, 1984 and February 1985 and this Court has twice refused to grant certiorari to review those decisions and questions?

2. Should certiorari be granted to a Petitioner who has distorted and fabricated the factual record on appeal in violation of Supreme Court Rule 21.5?

3. Has the First Amendment been violated by a libel judgment in which Respondent proved injury to his reputation and was awarded $66,666.67 in compensatory damages and Petitioner, a millionaire, was found to have acted with actual malice and was ordered to pay $166,666.67 in punitive damages?

4. Should the rule enunciated in Batson v. Kentucky, 106 S. Ct. 1712, 90 L. Ed. 2d 69,

No. 84-6263 (1986) be extended to jury selection in all civil petit jury trials, in the absence of any statutory or constitutional provision to that effect?

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W. BEDFORD MOORE, III

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Respondent, W. Bedford Moore, III (Moore) respectfully prays that the petition for writ of certiorari of Petitioner, James N. Fleming (Fleming), be denied on the grounds that the issue raised in the second question presented in his petition is neither novel nor important for decision by this Court, and that this Court does not have jurisdiction to consider the remaining questions raised in the petition.

OPINIONS BELOW

Moore rejects Fleming's assertion that the questions presented in his petition were finally resolved by the Supreme Court of Virginia on January 24, 1986 and that all earlier orders and opinions were merely interlocutory. Fleming's references to the dates of various orders and opinions and their subject matter are correct.

STATEMENT OF JURISDICTIONAL GROUNDS

The petition for certiorari was not timely filed to preserve questions 1, 3 and 4 for review by this Court and this Court does not have jurisdiction over them. Fleming seeks certiorari to review the judgment of the Supreme Court of Virginia entered on January 24, 1986. None of the matters raised in questions 1, 3 or 4 of the petition was the subject of that decision. The only questions presented by Fleming to the Supreme Court of Virginia in that appeal related exclusively to whether the trial court had ordered a sufficient remittitur of the jury award as mandated by the

Supreme Court of Virginia (App. A). The issues raised in questions 1, 3 and 4 have been the subject of three other petitions for certiorari filed by Fleming. They have all been raised, in one form or another, in Fleming v. Moore, Record Nos. 84-382, 84-1740 and 85-1532. Certiorari has been denied in each case. Fleming v. Moore, Record No. 84-382, cert. denied, 105 S. Ct. 366, 83 L. Ed. 2d 302 (1984); Fleming v. Moore, Record No. 84-1740, cert. denied, 105 S. Ct. 3513, 87 L. Ed. 2d 643 (1985); Fleming v. Moore, Record No. 85-1532, cert. denied, 106 S. Ct. 1644, 90 L. Ed. 2d 189 (1986).

Fleming has conceded that all of his federal constitutional issues were presented to the Circuit Court of Albemarle County and the Supreme Court of Virginia in an appeal decided on February 1, 1985. See, Fleming v. Moore, sub. nom. The Gazette, Inc. v. Harris, 229 Va. 1, 325 S.E.2d 713 (1985). He also conceded that when the Supreme Court of Virginia affirmed his liability in Fleming v. Moore it was a final ruling on the federal consti-

tutional issues he raised in the state court proceedings. See Petition for Writ of Certiorari, Record No. 84-1740 (p. 1). Moore agreed with that statement of jurisdictional grounds in his brief in opposition. See Brief in Opposition to Petition for Writ of Certiorari, Record No. 84-1740 (p. 1). The February 1, 1985 judgment of the Supreme Court of Virginia finally adjudicated every substantive issue in this case. All constitutional and common law issues were decided, leaving only the matter of remittitur open on remand to the trial court. 229 Va. at 49, 325 S.E.2d at 745. Fleming properly petitioned for certiorari to that decision. See Record No. 84-1740. It was a final judgment under 28 U.S.C. § 1257 (1982) because the federal issues in the case would survive any possible outcome of the remittitur proceedings and would require resolution by this Court. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 480-481, 95 S. Ct. 1029, 1038-39, 43 L. Ed. 2d 328 (1975). Even if one were to argue that the June 7, 1984

and February 1, 1985 adjudications of the constitutional questions by the Supreme Court of Virginia might not have been final, the fact is that Fleming petitioned this Court three times seeking review of these issues, briefing them fully each time, and raising most every conceivable argument in support of his positions. He has had his day in court. Surely, there must be an end to this process sometime, despite Fleming's demonstrated willingness to litigate ad infinitum.

The instant petition represents Fleming's fourth attempt to persuade this Court to take his case on these issues and it comes too late under the statutory provisions governing the jurisdiction of this Court. 28 U.S.C. § 210(c) (1982). This Court should give no consideration whatever to the issues raised in questions 1, 3 and 4 of Fleming's petition for certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Moore adopts Fleming's statement of these provisions.

STATEMENT OF THE CASE

Moore rejects Fleming's statement of the case. The facts set forth by Fleming are distorted, misleading and in some instances false. Fleming similarly distorted the record in his petition for certiorari in Record No. 84-1740. In the nine-year history of this litigation, Fleming has had, at various times, 18 different attorneys appear on his behalf, only five of whom (not including his present counsel of record) appeared at either of the two trials of this case. While this may explain the gross inaccuracies and distortions in Fleming's statement of the case, it does not excuse them. To correct the record, Moore submits the following statement of the case.

Moore has taught humanities at the University of Virginia since 1947 and resides in a racially integrated area of Albemarle County, Virginia, where he has enjoyed cordial relations with his black neighbors. His property shares a common border with a 128-acre parcel on the Rivanna

Reservoir known as Evergreen, owned by Fleming and three white business partners. The reservoir is the principal water supply for more than 30,000 area residents. In October, 1974 Fleming and his white partners filed a special use permit application to build 804 housing units on the Evergreen site (Evergreen I). The land was not zoned for this size development and the housing could not be built as a matter of right (Tr. 307-08, 315, 334).[1] There is no record of Fleming ever "expressly announcing" that he would sell to blacks and whites as he now asserts (Pet. 5), and Fleming cites nothing in the record for this naked assertion.

Moore knew nothing of the Evergreen plan until he was routinely notified by the county as an adjoining landowner of a site plan conference in November, 1974. At that meeting, Moore spoke with Fleming about the possibility of purchasing

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[1]References to the trial transcript are indicated as follows: "(Tr.)". References to plaintiff's exhibits are indicated as "(PX)" and defendant's exhibits as "(DX)". References to the instant petition for certiorari are indicated as "(Pet.)".

a small fraction of an acre of land where Moore's driveway meets the public road, a subject they had discussed several years earlier (Tr. 65). However, after reviewing plans for this massive development, Moore realized he would be opposed to it. Thinking it would be dishonorable to negotiate privately with Fleming for the property at his driveway while publicly opposing the development, Moore wrote Fleming a short, polite letter to that effect (PX 4).

Pollution, not race, was the overwhelming issue in the Evergreen matter until Fleming and his attorney, Jeroyd X. Greene, vigorously injected racism into the two hearings the County Board of Supervisors held on Evergreen I (Tr. 182-188, 279, 193-99, 290; DX 4; PX 9). Fleming correctly states that charges of racism permeated the dispute (Pet. 5); he generated 99% of them and never proved any of them as to Moore. Although the county planning staff recommended approval

of Evergreen I, Fleming did not wait for the supervisors to meet or to express any opinions on the project before bringing race into the matter. Prior to the supervisors' first hearing he sent every member of the board a letter captioned "THE TRUE FACTS" in which he raised racial bias as an issue (DX 4). He brought Mr. Greene to that hearing and together they made racism an issue (DX 4). Serious and legitimate concerns relating to pollution of the reservoir were raised at the hearing by many persons and organizations, including the black mayor of Charlottesville, the chairman of the Rivanna Water and Sewer Authority, the executive director of the Piedmont Environmental Council, a member of the Virginia House of Delegates, the League of Women Voters, various citizens' and sportsmen's groups, professors of urban planning and engineering at the University of Virginia, a pollution control specialist for the State Water Control Board, and others, including Moore.

Moore's public opposition to Evergreen was brief and insignificant. Fleming distorts and misrepresents the record in an effort to convince this Court that Moore was a leader of opposition forces in the Evergreen matter; nothing could be further from the truth. Moore did not organize any efforts against Evergreen. He was neither an officer nor a director of any of the numerous citizens organizations that opposed Evergreen. He gave no interviews and made no statements to the press about Evergreen. As Moore put it, "I simply opposed it on my own account" (Tr. 73-74).

The first Evergreen plan was proposed in October, 1974 and defeated by the Board of Supervisors in January, 1975. A second Evergreen plan (Evergreen II)—the only plan relevant to Fleming's petition for certiorari—was filed in November, 1975. Fleming published his libel in January, 1976, a few days before the supervisors defeated the second plan. During that entire 16-month period, Moore spoke no more than three times and never

spoke for more than a few minutes. During the time the county considered Evergreen II, Moore spoke only once, and that was from his seat in the audience merely to respond to a personal attack from Fleming's attorney. He did not speak on his own initiative, nor did he speak to the merits of the second Evergreen plan.

It is important to note that Moore never "took the rostrum" except in response to personal attacks on him by Fleming or Fleming's attorney. Moore only spoke up to set the record straight after being insulted or goaded by Fleming. Fleming now portrays these brief and generally defensive remarks as being the vanguard of the opposition to Evergreen, an assertion that is as unsupported as it is preposterous.

Moore did not become identified in the public eye as a leader of the opposition to Evergreen. Fleming now argues he led the opposition and quotes Moore's attorney's trial testimony out of context on this issue (Pet. 9). When questioned

by Fleming's counsel at trial on this subject, Moore's attorney during the Evergreen controversy stated:

> I don't think the public knew about it. Perhaps people that attended those meetings might have seen him. But his name in a public sense might have appeared in the newspaper once or twice in three years. (Tr. 289).

Not surprisingly, Fleming never bothers to advise this Court of the enormous and legitimate public sentiment against Evergreen and the many individuals and organizations who, unlike Moore, did play significant roles in preventing the rezoning of the Evergreen tract (Tr. 295-98, PX 8, 9, 10, 11, 12, 13, 17, DX 1, 4, 8).

Fleming states the supervisors asked Moore to meet with Fleming because they "regarded Moore as one of the principal opponents of the project" (Pet. 10). Fleming fails to note this request was made four months after Fleming libeled Moore and the supervisors made their request because it related to a matter affecting Moore's land, not because they regarded him as leader of any opposition (PX 17). This distortion and half-truth

is typical of Fleming's petition. Fleming's statement of facts might lead this Court to conclude Moore's opposition was the sole, proximate cause of the defeat of the plans. This assertion is groundless.

Fleming now makes much of two offensive remarks attributed to one supervisor which came to light in testimony at an unrelated trial in April, 1976—fully three months after Fleming libeled Moore in his paid advertisement (Pet. 6-8). Fleming never suggests Moore had any connection with this supervisor or his remarks. They formed no part of his libelous advertisment. However, the supervisor's alleged statements are as shocking and vile as they are irrelevant to this case. Moore can only surmise Fleming has injected them into this case—for the first time in this litigation's nine year history—as part of his last-ditch effort to obtain certiorari at any cost.

In 1975, local governments responsible for the reservoir implemented plans to study protection and reclamation measures. As the community's

chief source of drinking water the reservoir has been a public concern of local governments since 1971 (Tr. 350-52). In June and July, 1974, before Evergreen I, the supervisors, Charlottesville city council and planning district commission received evidence regarding pollution, agreed the reservoir was in serious danger of eutrophication from runoff from housing development and other human activities in the watershed and appointed a public panel to study measures to address the problem (Tr. 298-99, 343-45, 350-52; PX 10, PX 11, PX 13). The environmental concerns regarding the reservoir were not a sham concocted to defeat Evergreen (Tr. 308-09). In the summer of 1975 the panel recommended and the local governments retained professional consultants to study the pollution problem and propose solutions (Tr. 301-02, 321-22). Fleming had knowledge of this action. Also, the Albemarle County soil erosion and sedimentation ordinance was amended that summer to preserve the reservoir (Tr. 343-44). Ultimately,

all land in the watershed was downzoned to address pollution problems (Tr. 318-19).

In November, 1975, Fleming hastily filed his plans for Evergreen II after a group of conservation-minded supervisors were elected to take office on January 1, 1976; protection of the reservoir had been a central issue in that campaign (Tr. 434). Environmental concerns were again raised, this time bolstered by an exhaustive study of pollution of the reservoir (Tr. 301-02, 321-22) and an amended local soil erosion ordinance to preserve the reservoir (Tr. 343-44). Fleming's second Evergreen plan, like the first, failed to address the county's water pollution concerns (Tr. 198-99, 295-305, 342-43, 345-46, PX 9, DX 1).

Fleming states that the Board of Supervisors voted to impose a moratorium on construction in the "area in issue" on January 14, 1976 and this incited him to publish his libelous advertisements on January 15 and 16, thus "triggering" the

instant litigation (Pet. 11). Fleming has concocted these "facts" especially for this Petition. In truth, Fleming testified he began drafting his libel about five weeks earlier in December, 1975 when the Planning Commission deferred a vote on Evergreen II (Tr. 220). The new, pro-conservation supervisors were set to take office in January, 1976 and Fleming knew the Commission's deferral meant Evergreen II would be voted on by them, not the lameduck supervisors he had sued in federal court (Tr. 220-21; DX 1). It is not true the building moratorium effectively rejected Evergreen II (Pet. 11) and there is nothing in the trial record to support this. Indeed, Fleming cites "App. 192-194" as support for these "facts" (Pet. 11) but those pages of testimony do not even refer to the same subject matter. In fact, the Planning Commission recommended approval of the project on January 13, 1976 (Tr. 336) but Fleming, as with Evergreen I, injected race before the supervisors voted. They voted against the project several days after the libel

was published. Again, Fleming employs untruths and half-truths to manufacture a record to bolster his case.

Fleming published his libelous attack in the student newspaper of the University of Virginia where he knew Moore made his livelihood (Tr. 224-28). Fleming acknowledged he believed university students would respond to a racially-motivated appeal since, "[w]henever you talk of racism they show a certain amount of interest, the better type of students show a certain amount of interest" (Tr. 229).

Fleming's accusations of racist belief and racist activity on the part of Moore were utterly false. Moore and several witnesses proved he was not a racist. Evidence showed Moore had been raised to abhor racism and had never said or done anything that could be construed as racist. Fleming produced no evidence at trial tending to suggest there was any truth to his defamatory charges.

Despite the falsity of his charges of racism, Fleming characterizes his charges as mere opinion and suggests that he "believed" Moore was a racist. Fleming's testimony in this regard, as in most respects at the second libel trial, was inherently incredible. He was impeached on the stand with his own prior sworn testimony twenty-five times (Tr. 177-78, 180-81, 191-92, 193, 202-03, 203-04, 208-09, 219, 225, 225-26, 227-28, 228-29, 230-31, 232-33, 233-34, 238, 395, 398-401, 401, 402, 401-04, 404, 418, PX 14, and PX 15).

It is not surprising Fleming quickly glosses over the evidence at trial, trivializing it and suggesting both sides produced substantial evidence to support their contentions (Pet. 14-15). Fleming attempted to prove his factual allegations of racism against Moore and failed miserably. The record shows that prior to January 15 and 16, 1976 when the libel appeared, there was no information from which Fleming deduced Moore was a racist.

Fleming testified he believed he was treated differently than white developers and Moore was not concerned with development by white people around the reservoir (Pet. 12). He alleged the county imposed conditions on Evergreen it did not require of white developers (Pet. 5), and that Moore and others who opposed Evergreen did not oppose white developers near the reservoir.

Fleming used two developments near the reservoir for comparison: Panorama and Ivy Farms. However, unlike Evergreen, these projects were zoned for their proposed densities and did not require rezoning, and Fleming, an expert real estate developer and appraiser, was aware of this (Tr. 307, 325, 334, 487-489). They only required site plan approval (Tr. 315). Further, Fleming never cited a single instance known to him before his libel was published in which any developer, white or black, obtained a rezoning near the reservoir such as Evergreen required.

Fleming conceded he had not attended many meetings where the county considered other developments around the reservoir, either before or contemporaneously with Evergreen, nor did he have much knowledge about the nature of any public opposition to developments proposed by whites (Tr. 195-97). Indeed, the fact that projects developed by whites were approved (regardless of their zoning) was essentially the only basis he had for concluding he was the victim of racism (Tr. 195, 197, 218-19).

By his own admission, his familiarity with other developments was scanty at best. He never testified to any personal knowledge of conditions attached to other developments. Nevertheless, the county planning staff recommended approval of both Evergreen I and Evergreen II with conditions. The chief reason Fleming's plans were rejected was that he never satisfied the environmental concerns of the staff and supervisors and his engineer did not address them in the second Evergreen plan (Tr. 198-99, 295, 305. 341-43, 345).

Fleming knew absolutely nothing about whether Moore did or did not oppose other developers. Before Fleming published his advertisement he had no information to suggest that Moore failed to oppose other developments around the reservoir. He was impeached with his prior sworn testimony when he stated at trial that the developer of Ivy Farms told him Moore did not oppose that development, and then admitted he had not talked to the developer (Tr. 202-03). He also conceded that he did not know whether Moore opposed Panorama because Fleming never talked to its developer about Moore's opposition or lack of it regarding Panorama (Tr. 203-04).

Fleming repeatedly testified hypothetically regarding Moore and others who opposed Evergreen, stating they would be racists if they had not opposed white developers (Tr. 194-95), but adding he did not know that they did not oppose those developers (Tr. 195-97). Indeed, he undoubtedly knew otherwise. He was told specifically that opposition to Ever-

green was not unique at the very first meeting of the board of supervisors on Evergreen I on January 22, 1975. Marsha Mashaw of the League of Women Voters responded directly to Fleming's and his attorney's charge that white developers had not faced opposition around the reservoir (DX 4):

> I would also like to add something that is not in my statement, but that is in response to something that was said earlier. That is, as you, the members of the Board of Supervisors know, the League of Women Voters has appeared before you many times either to speak for or against petitions, special permits, and zoning requests which have been before you. We have consistently opposed high density zoning around the Reservoir. We have been advocating conservation zoning for several years around the Reservoir and I might add that one of our Vice-Presidents has not been too happy about this. But this is a policy of our Board, and we have been before you many times. I think your record will also show that we opposed the Hollymead development mainly because it was not going to have any low cost housing in it. I think the record will also show that whenever any large developments have come before you one question that the League has consistently asked is what are going to be the provisions for low and

> moderate income people. So, I think it is unfair to say that the people who are before you tonight are here only for this particular instance and have never been before you at other times. Thank you. (DX 4).

At trial, Fleming repeatedly referred to the approval of Panorama by the county (Tr. 186, 194, 196-97) and asserted it was built (Tr. 194), but his own witness, supervisor Chairman Gerald Fisher, established that Panorama had not received county approval and was never built (Tr. 436-38). Fisher also established as part of Fleming's case in chief that race played no part in the county's treatment of Evergreen (Tr. 458-59).

In summary, Fleming's best hope of having his case heard on appeal is through shocking distortions of the trial record and the history of the case. Fleming cannot rest his petition on the facts as they actually exist; he knows certiorari will be denied. He creates, therefore, a fairy tale consisting of half-truths, innuendo and lies, much to the same effect as his testimony at trial during which he was impeached twenty-five times.

ARGUMENT

In accordance with Bose Corporation v. Consumers Union of the United States, Inc., 466 U.S 485, 104 S. Ct. 1949, 80 L. Ed. 2d 502, (1984), the Virginia Supreme Court conducted an independent examination of the entire record in order to ensure that the judgment of the trial court did not constitute a forbidden intrusion on the exercise of free expression. 229 Va. at 43-49, 325 S.E.2d at 742-44. Moore submits that upon such an examination this Court will also conclude there has been no intrusion on the exercise of free expression by the trial court.

I. THIS COURT DOES NOT HAVE JURISDICTION OVER THE MATTERS RAISED IN PETITIONER'S QUESTIONS 1, 3 AND 4 BECAUSE THEY WERE DISPOSED OF BY ORDERS OF THE SUPREME COURT OF VIRGINIA IN JUNE, 1984 AND FEBRUARY, 1985, AND THIS COURT HAS TWICE DENIED CERTIORARI TO THOSE DECISIONS.

Respondent's argument and authority in support of this section of the brief is found in the Statement of Jurisdictional Grounds (supra, pp. 2-6).

II. THE PETITION SHOULD BE DENIED PURSUANT TO SUPREME COURT RULE 21.5 BECAUSE PETITIONER HAS FAILED TO ACCURATELY PRESENT THE FACTS ESSENTIAL TO A READY AND ADEQUATE UNDERSTANDING OF THE POINTS REQUIRING CONSIDERATION.

As Moore's Statement of the Case makes clear, Fleming has deliberately distorted the factual record below and has fabricated certain aspects of it in an effort to have certiorari granted in this case. Such conduct should not be rewarded.

Respondent submits that such inaccuracy and distortion of the record is sufficient reason for denying the petition, pursuant to Rule 21.5, and the Court is urged to do so.

III. THERE IS NO VIOLATION OF THE FIRST AMENDMENT WHEN RESPONDENT WAS ORDERED TO REMIT A SUBSTANTIAL PORTION OF HIS COMPENSATORY AND PUNITIVE AWARDS, HE ACCEPTED REMITTITUR IN THE TRIAL COURT WITHOUT PROTEST, THAT REMITTITUR WAS AFFIRMED ON APPEAL AND THE AMOUNTS AWARDED FAIRLY COMPENSATE HIM FOR INJURY TO REPUTATION AND FAIRLY PUNISH PETITIONER'S FALSE AND MALICIOUS LIBEL.

Fleming argues, without supporting facts, that he was punished by the jury for daring to voice an unpopular view that has "been of unique popularity in that region" for centuries (Pet. 48). One wonders what this unspecified "view" was and what evidence there is that the jurors punished him for holding it. However much one chooses to live in the past, the reality is that racism is unpopular today and that the perpetrators of racism are far more likely to be punished for their behavior in this country than the victims of racism. The trial court made this quite clear on April 21, 1983 in refusing to set aside the verdict:

> We deny the motion to set aside the jury verdict and to grant a new trial. The jury is the conscience of the community. Apparently this was a jury that felt strongly about the curse of racism and wished to make a strong statement about the unjustified use of the epithet of racism (Tr. 1003).

It was Moore who was the victim of racism in this case, not Fleming. It was Moore whose reputation was injured and who suffered the emotional strain of being publicly branded a racist in the

community in which he had made his livelihood for three decades. Considering the evidence adduced at trial and the subsequent modification in the amount of the verdict in the Virginia courts, there is no basis for granting certiorari. Justice White did indeed state in Gertz v. Robert Welch, Inc., 418 U.S. 323, 397-98, 94 S. Ct. 2997, 3035, 41 L. Ed. 2d 789 (1974) (White, J., dissenting), that "immoderate verdicts" should be corrected on a case by case basis upon examination of the whole record. This, in fact, was done by the Supreme Court of Virginia on February 1, 1985 when it directed the trial court to order a remittitur of the jury verdict. At the time the Supreme Court of Virginia took that action, the verdict had a value of approximately $700,000, consisting of an award of $100,000 for compensatory damages, $250,000 for punitive damages and prejudgment interest which ran from the date of the libelous publications in 1976. The trial court remitted both the compensatory and punitive awards, and

refused to award prejudgment interest, resulting in a total award to Moore of $233,333.33. Moore accepted this remittitur without protest. The Supreme Court of Virginia reviewed the trial court's remittitur order and upheld it. Consequently, the original jury verdict has now been reduced by 66% as a result of state court proceedings. There is no basis for the federal courts to reconsider this matter now.

Fleming belittles the injuries his libelous publication caused Moore (Pet. 15), but the evidence at trial supports the amount of the compensatory award as remitted. Moore suffered stress, embarrassment and humiliation and feared for his reputation. Moore testified he was "seriously upset" to have a man he disagreed with in public "go around behind me and put into the University student newspaper such a malicious attack on me, my character. This was done in front of my colleagues at the University, students, black and white. I felt it put a gap in my honor that could

only be restored by vindication by my fellow citizens on this jury." (Tr. 89-90) Fleming's libelous advertisement appeared twice in the student paper which had a circulation of 16,500 and was read throughout the community (Tr. 167)

Moore's colleague of 24 years, Luther Gore, corroborated Moore's testimony, stating Moore was "very shocked at the claims being made in the ad" and he seemed distressed. (Tr. 358) "[H]e felt that it, of course, went very much against what he stood for in his teaching career." (Id.) Additionally, Gore offered the following testimony:

> Q. Let me ask you this way, in terms of Mr. Moore's reaction to the ad, did he ever subsequently express any feelings, any continued feelings about his feelings respecting the ad that were first expressed when the ad came out?
>
> A. I'm sorry...
>
> Q. Did he continue to express any feelings of shock or what have you with respect to the ad?
>
> A. From time to time, yes.
>
> Q. All right, sir. Did you receive any reaction from colleagues or students at the time the ad came out with respect to the ad?

A. Yes, I think a good many people were shocked and surprised that the charges were being made.

(Tr. 358-59)

Bernard P. Chamberlain, an attorney who testified that he had been closely acquainted with Moore since Moore's early days as a professor, said that Moore was "outraged" by Fleming's advertisement. (Tr. 163) "Mr. Moore was very upset by it," Chamberlain said, adding, "...he was afraid it was going to have an effect on his friends, an effect on his students...he felt [it] was a terrible wrong." (Tr. 163)

William A. Elwood, a University professor and former Assistant to the President of the University for Affirmative Action, said that several undergraduate students had asked him about the person mentioned in Fleming's advertisement. (Tr. 355-56) Elwood testified that an inquiry had been made by the black associate dean of student affairs. Id. The associate dean told Elwood that he had received many questions about the

advertisement. Elwood said that some faculty members also made inquiries. Id. Additionally, Moore testified that he knew of inquiries made "by those who didn't know me that were black, that is, some graduate students and undergraduates made inquiries to other people." (Tr. 91)

Moore testified that the defamation affected his teaching by altering his attitude toward his material and his students. (Tr. 90) The advertisement made him self-conscious about his race in a way he deplored, citing, for example, changes he made in the method of teaching the writings of William Faulkner. This Court must also consider the racial climate at the University during January, 1976 in judging the defamation's impact. Both Moore and former University President Edgar F. Shannon testified that the intensity of racial tensions peaked in the 1975-76 academic year. (Tr. 92, 248-50) The timing of the libel could not have been more devastating for a University professor. In short, the advertisement undermined

the ease with which Moore was able to conduct himself in the academic community. As Mr. Shannon noted, the perceived racial attitudes of a University professor "can make a good deal of difference in terms of the ... atmosphere in the classroom involving the white students as well as the black students..." (Tr. 251)

Moore said the appearance of the advertisement in the University newspaper was of particular concern since it was printed during the height of the so-called Farmington Country Club flap. "[I]t was very awkward indeed because Frank Hereford had just come to the Presidency and was under a heavy challenge...They were raising the question of Farmington's racial policy, discriminatory policy, and Mr. Hereford's membership..." (Tr. 92) Moore testified he had never belonged to Farmington Country Club. (Tr. 93)

Summarizing the injury he suffered, Moore said "It is not an experience I would visit on most people. It's very unhappy." (Tr. 94) Moore said

he experienced and continued to experience stress, embarrassment and humiliation "very keenly" and "I don't think it has lessened any. It still stings. I still feel my honor has been questioned, that's not something you shrug off easily." (Tr. 149-50) The Supreme Court of Virginia found that "[c]learly Moore suffered damage to his reputation, embarassment, humiliation and mental suffering from this defamatory publication..." 229 Va. at 48, 325 S.E.2d at 745.

> Testimony showed that Moore was "very upset" by the publication and felt he had experienced "a terrible wrong." The evidence showed that other faculty members at the University as well as students made repeated inquiries about Moore and whether the statements in the items were true.

Id. at 47, 325 S.E.2d at 744.

The size of the compensatory award--$66,666--is in proportion with verdicts from other jurisdictions involving injury to reputation, embarassment, stress and humiliation, where evidence of damage was difficult to measure precisely. In the retrial of Gertz v. Robert Welch,

Inc., 680 F.2d 527 (7th Cir. 1982), cert. denied, 459 U.S. 1226, 103 S. Ct. 1233, 75 L.Ed. 2d 467 (1983), the Court of Appeals affirmed a jury verdict of $100,000 in compensatory and $300,000 in punitive damages. The action was brought against the publisher of an article in which Gertz, an attorney, was described as a "communist-fronter," a "Leninist" and a "Marxist." On appeal, defendant argued that the compensatory award was improper because there had been no proof of actual injury. The court held that "Gertz has proved actual injury in this case. Gertz testified to severe mental stress, anxiety and embarassment which he suffered as a result of the article. Several attorneys testified at trial that calling a lawyer a communist would be highly injurious to a professional reputation." Gertz, 680 F.2d at 540. The Court noted that one witness testified at trial that he had heard the defamatory statements about Gertz repeated, Id., not unlike the instant case. The Seventh Circuit summarized thusly:

> The Supreme Court has recognized that actual injury in defamation cases is not solely measured by out-of-pocket economic loss. "Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation and mental anguish and suffering." Gertz v. Robert Welch, Inc., 418 U.S. 323, 350, 94 S. Ct. 2997, 3012, 41 L. Ed. 2d 789 (1974). This kind of actual injury was clearly established by the evidence presented at trial.

Id.

In Selby v. Savard, 134 Ariz. 222, 655 P.2d 342 (1982), the Supreme Court of Arizona affirmed a verdict awarding $150,000 actual damages and $350,000 in punitive damages for defamation involving injured reputation, embarassment, humiliation and stress. Plaintiff was an enforcement agent in the Arizona Department of Liquor License and Control and defendant operated a resort that served liquor. Defendant was not satisfied with the way plaintiff handled the investigation and made untrue accusations against plaintiff that were found to be defamatory and uttered with actual malice. Plaintiff offered no medical testi-

mony, but complained of deteriorating health as part of his damages. Plaintiff also showed evidence of declining job performance and, ultimately, retirement as a result of strain caused by defendant's accusations. 655 P.2d at 344.

A plaintiff was awarded $50,000 in compensatory damages and $150,000 in punitive damages when a newspaper article implied she formed an opinion on innocence as a juror prior to the conclusion of evidence. On appeal the award was affirmed. Macon Telegraph Publishing Company v. Elliot, 165 Ga. App. 719, 302 S.E.2d 692, cert. vacated, 251 Ga. 544, 309 S.E.2d 142 (1983), cert. denied, 466 U.S. 971, 104 S. Ct. 2343, 80 L. Ed. 2d 817 (1984).

In Melton v. Bow, 241 Ga. 629, 247 S.E.2d 100, cert. denied 439 U.S. 985, 99 S. Ct. 576, 58 L. Ed. 2d 656 (1978), the Georgia Supreme Court affirmed a verdict of $200,000 in a libel per se defamation case. There, a former university student brought an action for libel against the

university official who accused the student of committing the crime of theft. The Supreme Court found the verdict was not excessive and affirmed the holding of the Georgia Court of Appeals, which found:

> In view of the allegation that Dr. Melton abused his position of authority in a wanton and reckless manner to slander appellee, which allegations were supported by the evidence, and in the absence of any showing of prejudice or bias or corrupt means of reaching the verdict or any abuse of the trial court's discretion in refusing to overturn the verdict, we cannot say the verdict was excessive as a matter of law.

Melton v. Bow, 243 S.E.2d at 593.

Other recent cases involving compensatory verdicts comparable to the instant case include McHale v. Lake Charles American Press, 6 Med. L. Rptr. 2478 (La. Ct. App. 1980), (compensatory damages of $150,000 upheld and $25,000 attorneys' fees added under state statute, where a public figure was libeled by a newspaper editorial and evidence of damage included injury to reputation, humiliation, embarassment and mental distress; loss of income was alleged but not proved); Bindrim

v. Mitchell, 92 Cal. App. 3d 61, 155 Cal. Rptr. 29, cert. denied, 444 U. S. 984, 100 S. Ct. 490, 62 L. Ed. 2d 412 (1979) (trial court judgment affirmed but modified to $75,000 in compensatory and punitive damages where defendant's book pictured a fictional character resembling plaintiff and attributed words to the character found to be defamatory of plaintiff, and where plaintiff's evidence of damages consisted of injury to his profession); Burnett v. National Enquirer, Inc., 144 Cal. App.3d 991, 193 Cal. Rptr. 206 (1983), appeal dismissed, 465 U. S. 1014, 104 S. Ct. 1260, 79 L. Ed. 2d 668 (1984) (award of $50,000 general damages upheld, but $750,000 in punitive damages reduced to $150,000 where newspaper depicted plaintiff entertainer as intoxicated and rude in a Washington, D.C. restaurant, and where damages of lost reputation, shame, mortification and injured feelings were alleged).

Fleming's argument that this is the largest offically reported libel verdict in Virginia history

has no significance in this case, constitutional or otherwise. (Pet. 48) Of no significance at all is the listing of prior libel verdicts in Virginia in Table B of the Petition. The appropriateness of awards should be determined on a case by case basis; it is exceedingly difficult to measure the evidence adduced in one libel trial, perhaps many decades old, with that adduced in another trial on a completely different set of facts. Further, there is some degree of intellectual dishonesty in reproducing verdict amounts that are in some cases more than half a century old, without factoring in inflation. In short, reproducing verdict amounts in defamation cases in Virginia going back to 1925 does not assist this Court in determining whether there is constitutional significance in the award of damages in this case. Of far more significance to this case would be this Court's recent decision in Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 105 S. Ct. 2939, 86 L. Ed. 2d 593 (1985), in which a private plaintiff

recovered $50,000 in compensatory or presumed damages and $300,000 in punitive damages from a non-media defendant upon allegation that its reputation had been injured.

The punitive award—$166,666—is reasonable in light of the evidence of Fleming's malicious publication of the defamation in an attempt to intimidate and silence Moore and other opponents of Evergreen II. The award will serve as a warning to all who would employ similar reprehensible tactics to restrict the exercise of free speech. The award is only two and one half times the size of the compensatory award, a reasonable proportion. It has been held that punitive damages should bear some reasonable relationship to the actual damages suffered, and clearly the relationship here is reasonable. Fleming cites no cases where such a ratio is deemed unreasonable.

A case where the proportion of punitive to compensatory damages was challenged is Marcone v. Penthouse International, Ltd., 577 F. Supp.

318 (E.D. Pa. 1983), rev'd on other grounds, 754 F.2d 1072 (3d Cir.), cert. denied, 106 S. Ct. 182, 88 L. Ed. 2d 151, rehearing denied, 106 S. Ct. 548, 88 L. Ed. 2d 477 (1985)(appeals court found plaintiff to be a limited purpose public figure and held there was insufficient evidence to establish actual malice). There, the jury found that plaintiff had been defamed by an article in the November, 1978 issue of defendant's publication. The article discussed the distribution and sale of marijuana to U.S. markets specifically alleging that the typical new drug businessmen are attorneys since, it was claimed, federal judges do not sentence attorneys to prison. The plaintiff was listed as an example of an "attorney criminal." 577 F. Supp. at 323. The trial jury returned a verdict of $30,000 in compensatory damages and $537,500 in punitive damages for the plaintiff. In reviewing the award the court found that the punitive award was so excessive so as to shock the conscience of the court. Id. at 335. The court noted that

the award was almost 18 times the compensatory figure, which was in the court's view an adequate reflection of the harm inflicted by the defendant." Id. The court then stated:

> The purpose of punitive damages is to punish wrongful conduct and to deter its repetition... The court does not agree with the defendant, however, that the entire punitive damage award must be stricken as the product of passion and prejudice. The defendant does not point to any basis, other than the amount of the award, for finding that the jury was impassioned or prejudiced. Although the court does feel that the award was excessive, the excessiveness appears attributable to the excessive outrage over the total lack of regard for the rights of the plaintiff which the defendant exhibited in this matter.

577 F. Supp. at 335. The court reduced the punitive award to $200,000 based on the finding that the defendant "engaged in outrageous conduct and published the article with knowledge of its falsity or reckless disregard for its truth or falsity based on the other evidence in this case." Id. The court noted that the award as reduced was still over six times the amount of the compensatory damages awarded. Id.

The amount of the punitive award as it now stands represents approximately one-half the cash profit Fleming made from the sale of the Evergreen to the Nature Conservancy. (Tr. 394, 485-87, 499) The record in this case shows that Fleming purchased the land for approximately $35,000 and was paid $335,000 by the Conservancy. Although Fleming testified that the sale price was 50 percent below the fair market value of the property, his own witness, Paul Saunier, revealed enormous tax benefits to Fleming resulting from the sale to the non-profit Conservancy at below market price:

> POINDEXTER: The appraised value was about...
>
> SAUNIER: About a half million, the difference being the, what commits the Nature Conservancy to do these things, to take a business proposition to someone and point out that because of the tax advantages of selling the property for permanent conservation purposes, that the, it, it's a good arrangement for everybody involved.

(Tr. 476). Additionally, the windfall profit realized form the sale of the Evergreen property was not

earned as the result of any improvements Fleming made to the property; the property was sold in virtually the same condition as when Fleming purchased it ten years earlier. Fleming's cash profits and tax savings from the sale of Evergreen exceed $500,000.00.

At trial Fleming testified his net worth was approximately one million dollars in 1982[2]. In fact, the punitive award represents only 16.6 percent of Fleming's net worth, which can hardly be characterized as destructive. Fleming bemoans the chilling effect this award will have upon freedom of speech (Pet. 52). There is no basis for this argument. Fleming lied, he was caught and he was punished. It was Fleming who sought to diminish public debate and free speech by publishing

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[2]Fleming testified he owned assets worth approximately one million dollars (Tr. 404) and admitted that he undervalued his assets by 50 percent in sworn answers to Moore's discovery, not disclosing correct values for assets and failing to disclose other assets altogether. (Tr. 392-404)

the defamation in an attempt to silence Moore. It was Fleming who abused his position as a licensed real estate salesman and appraiser by maliciously injecting false and defamatory assertions into a debate on the merits of his proposed real estate development.

One object of punitive damages is to punish the immediate wrongdoer who acted wantonly, oppressively, and maliciously; another is to warn him as well as others not to engage in similar conduct. Giant of Virginia, Inc. v. Pigg, 206 Va. 679, 685-686, 152 S.E.2d 271, 277 (1967). The punitive award in this case will carry a message to Fleming's fellow citizens that their right to speak freely against proposed real estate developments and other issues will not be inhibited by developers or others who would limit the right of free speech by attempts to destroy reputations with malicious falsehoods.

There is no fixed standard for measuring punitive damages, and the jury is given reasonable

latitude in exercising its discretion in setting an amount. Old Dominion Branch 4069, National Association of Letter Carriers v. Austin, 213 Va. 377, 386, 192 S.E.2d 737, 743 (1972), rev'd on other grounds, 418 U.S. 264, 94 S. Ct. 2770, 41 L. Ed. 2d 745 (1974). In assessing punitive damages, however, the jury or trial judge can consider a defendant's finances and worth in order to determine an amount to punish him and deter others. Harmon v. Cundiff, 82 Va. 239, 246 (1886).

In affirming the jury's finding of actual malice to support the punitive award in the instant case, the Court made an independent examination of the record to be certain the punitive award did not constitute a forbidden instrusion on free expression. 229 Va. at 49, 325 S.E.2d at 745. It found that the trial court properly instructed the jury that the plaintiff was required to establish by clear and convincing evidence that Fleming knew the statements in his advertisement were

false or that he made them "so recklessly as to amount to a reckless disregard for the truth . . .. Id. at 49, 325 S.E.2d at 745-46. In its opinion, the Court assumed, without deciding, that Fleming was correct in his position that Moore failed to prove that Fleming knew the defamatory statements were false. Id. at 49, 325 S.E.2d at 746. "Nonetheless, there was substantial, credible evidence to support the jury's finding that Fleming acted with recklessness that was tantamount to a willful disregard for the truth." Id. The Court stated:

> Fleming abandoned all judgment and reason in composing and publishing the advertisement. For example, he accused Moore of racial prejudice without possessing any objective basis for the charge. Naming Moore in the publications, Fleming demeaned him as being a tenured position-holder living off the "public dole" at the expense of working people. There is no evidence that Moore or any other person in a similar occupation, was being supported to the prejudice of other groups of citizens. There was no proof that Fleming had any legitimate reason to believe Moore wished to deprive "working people" of any opportunity. Fleming had no grounds to suppose that Moore, as one of the so-called "no-growth people" was oppressing other individuals. Fleming recklessly stated that Moore's opposition to the development on pollution grounds was

> a "sham" to conceal his supposed real purpose, i.e., oppression of black citizens and others who would live in the planned community. Finally, Fleming's act of publishing the advertisement in the student newspaper on the campus where Moore taught supports the conclusion that defendant's motive was to intimidate Moore in order to eliminate the voice of a leading opponent to Fleming's development.

229 Va. at 50, 325 S.E.2d at 746.

Fleming complains that the instructions on damages in this case merely listed the types of injuries that could be redressed without guidance as to how compensation was to be measured, and that these were presumably not "appropriate instructions" as required by Gertz. (Pet. 50-51) The instruction now complained of was given by agreement of counsel; Fleming's counsel, on the record, did not object to this instruction. (Tr. 564) Fleming did not offer an alternative instruction on damages, nor did he offer an instruction which would provide the "guidance" which his counsel now argues should have been provided. Certainly, he cannot now complain of an instruction he agreed to in October, 1982.

Moore notes in passing that the arguments advanced by amici curiae Philadelphia Inquirer and Capital Cities/ABC, Inc. are seriously misplaced. For example, they state the lower court apparently failed to take into account the fact that Moore was "not without the means to remedy any threatened injury by the constitutionally-preferred antidote to one-sided expression". (Brief 24) Presumably, the amici refer to the fact that Moore could have likewise taken out a paid advertisement in the student newspaper and denied that he was a racist or written a letter to the editor denying the charges. Such an argument not only ignores the reality of life, it essentially suggests that causes of action for defamation ought not to exist at all, since presumably reputation can be destroyed with one volley and instantaneously restored, intact in all respects, by serving up a return volley. Such an argument is not worthy of serious consideration by this Court. In addition, it is difficult to gauge what significance, if any,

the selective listing of awards in media libel cases has in this case. (Appendices A and B) This is not a media case, and the awards quoted by the amici dwarf Moore's award in this case.

The compensatory and punitive awards assessed against Fleming were tailored to compensate Moore for the injury he suffered and to punish Fleming for his outrageous conduct. There is no violation of the First Amendment in this case and certiorari is not warranted on these facts.

IV. THERE IS NO STATUTORY OR CONSTITUTIONAL PROVISION WHICH WOULD AFFORD PETITIONER A RULE SUCH AS THAT ENUNCIATED IN BATSON V. KENTUCKY, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

The issues presented in this question were raised in Record No. 84-1740 and certiorari was denied. Fleming v. Moore, Record No. 84-1740, cert. denied, 105 S.Ct. 3513, 87 L.Ed.2d 643 (1985). Moore contends these issues are not now properly

before the Court. Without waiving his objection, however, Moore will respond to Fleming's argument because the decision in Batson v. Kentucky, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) was issued after certiorari was denied in Record No. 84-1740.

At the trial of this case in October, 1982, after both counsel used their peremptory challenges to strike three veniremen each, counsel for Fleming "excepted" to the striking of two black veniremen by counsel for Moore (Tr. 22). The grounds stated in the exception were that "he [Fleming] is entitled to have black people on that jury just like everybody else has ... ." (Tr. 22) There was no suggestion at trial of racial animus on the part of Moore or his counsel in striking these veniremen, nor was there allegation or proof of any pattern of strikes against black jurors by Moore's counsel in other cases. Counsel for Moore did not ask questions or make statements during the voir dire examination and thus there is no reason to

infer racial animus on his part or Moore's. (Tr. 16) No jurors were excused for cause. One juror, a black man, indicated he was a friend of Fleming's former wife and felt that would interfere with his ability to render a fair and impartial verdict and he was excused without objection. (Tr. 13) There followed an extensive voir dire of the venire by counsel for Fleming inquiring into their racial attitudes and relationships, the racial composition of organizations and clubs to which they belonged and the like, at the conclusion of which not a single juror was challenged for cause. (Tr. 16-21) In sum, there were none of the indicia of racial discrimination that apparently existed in Batson. Fleming cannot meet the standards set out in Batson for proving discrimination, even if this were a case governed by Batson, which it plainly is not and ought not be.

The decision in Batson was based solely upon alleged violations of a black criminal defendant's rights under the Sixth and Fourteenth

Amendments and, as Justice Powell stated, "[t]he ultimate issue is whether the State has discriminated in selecting the defendant's venire ..." 106 S.Ct. at ____, 90 L.Ed. 2d at 86. There is no evidence or allegation in the instant case of any government discrimination against Fleming and the Sixth Amendment obviously does not apply. Rather, the constitutional guarantee applicable in this case is found in the Seventh Amendment which only states in relevant part that in civil cases "the right of trial by jury shall be preserved." U.S. Const. amend. VII (1982). In contrast, the Sixth Amendment provides that in all criminal prosecutions the accused is entitled to "an impartial jury" as well as the right to be informed of the nature and cause of accusations against him, to confront witnesses against him, to have compulsory process for obtaining witnesses in his favor and to have assistance of counsel. U.S. Const. amend. VI (1982). Plainly, the safeguards built into the Sixth Amendment, which form the foundation

of the decision in Batson, have no counterpart in the Seventh Amendment. It would require a strained and unprecedented reading of that Amendment to extend the test created in Batson to civil jury trials in the States.

It is difficult to fathom the true basis for Fleming's sweeping request for an extension of the Batson rule (Pet. 57). For example, in Batson, there was no "sensitive racial issue" involved; rather, the only matter relating to race at all was the fact that defendant was black. On the other hand, Fleming asks this Court to extend the Batson rule to civil jury cases in which there are "sensitive racial issues" which he does not define. Presumably, this rule would extend not only to every single case in which the defendant or plaintiff is black, but where there are any "sensitive racial issues" involved, regardless of the race of the parties.

It is submitted that the proposed "sensitive racial issue" standard is unworkable. Even if

this Court were to entertain such a rule, it would be more appropriate to apply it in a narrow class of cases in which a federally-guaranteed right relating to race is involved, such as those cases arising under the Civil Rights Acts. 42 U.S.C. §§ 1981 et seq. (1982). In the instant case, there is no suggestion that any federally-guaranteed right or privilege relating to race is involved. Fleming has already made a vain attempt to assert such rights and privileges in Fleming v. Moore, Record No. 85-1532. The Fourth Circuit Court of Appeals in affirming the dismissal of Fleming's civil rights suit stated:

> There is no question, of course, that in order to sustain an action under 42 U.S.C. §1983, a plaintiff must show both that he has been deprived of a right secured by the Constitution of the United States and that the defendant "deprived [him] of this right 'acting under color of any statute' " of a State. Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 155, 98 S. Ct. 1729, 1733, 56 L. Ed. 2d 185 (1978). There is likewise no question that Moore, in bringing his state libel action against Fleming, did not act on behalf of the State or any of its political subdivisions.

780 F.2d 438, 439-440 (1985), cert. denied, 106 S.Ct. 1644, 90 L.Ed. 2d 189 (1986).

The sole issues for decision by the jury in this libel suit were whether Fleming had falsely accused Moore of harboring racial animus toward him and committing various racist acts, whether these statements were defamatory and whether Moore had been damaged by them. Moore proved conclusively that the accusations against him were false, that he was not a racist and that Fleming had no reasonable basis upon which to conclude that he was a racist. Fleming never attempted to prove that his allegations of racist behavior on Moore's part were true. One searches in vain for the "sensitive" nature of the "racial issues" in this case. The simple fact is that throughout the so-called "Evergreen controversy" Fleming repeatedly used race as a weapon to harass and intimidate those who dared to oppose rezoning of property owned by him and his three white business partners. Fleming's charges of racial

discrimination were simply a means to an end, but certainly not the truth.

Fleming, perhaps realizing the folly of the sweeping and unmanageable rule he suggests, argues that Batson need not extend to every civil case (Pet. 57). It is difficult to understand, however, why this rule would not logically have to be extended to every civil case in which there was a racial issue involved or either party belonged to a "racial group capable of being singled out for differential treatment." Batson, 106 S.Ct. at ____, 90 L. Ed. 2d at 86. Because Batson did not involve a single "sensitive racial issue" and will be applied across the board in every case in which a criminal defendant belongs to such a racial group, there is no reason to think that the rule Fleming asks for can be confined to just one particular class of civil cases involving racial minorities.

In sum, counsel for both parties in this case

used a neutral state statute[3] to exercise peremptory challenges to a panel of veniremen found to be free of any bias or prejudice to either side. The libel action arose exclusively under the common law of Virginia, the parties were a private plaintiff and a non-media defendant, and the defamation related to the non-media defendant's private real estate development. Fleming's rights and privileges under the laws of Virginia and the Constitution of the United States were preserved at every turn, and there is simply no basis on these facts for this Court to extend the Batson rule to a broad class of civil cases as Fleming urges it to do.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be denied. Moore further submits that to the extent any additional response is called

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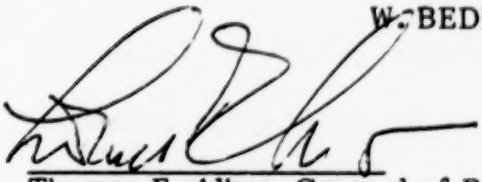
[3] VA. CODE ANN. § 8.01-359(B) (1977).

for to Petitioner's Questions 1, 3 and 4, he relies upon the arguments he has already filed with this Court in response to Fleming's petitions in Record Nos. 84-382, 84-1740 and 85-1532.

Respectfully submitted,

W. BEDFORD MOORE, III



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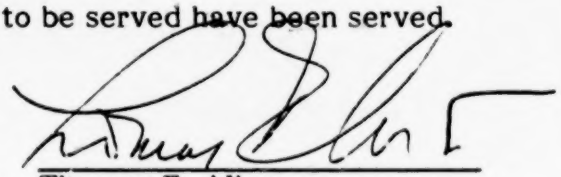
Counsel for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of September, 1986, I served counsel of record for petitioner with three (3) copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari by mailing the same, first class postage prepaid, to counsel at the following address:

Eric Schnapper
NAACP Legal Defense and
Educational Fund, Inc.
16th Floor, 99 Hudson Street
New York, NY 10013

All parties to be served have been served.



Thomas E. Albro

Appendix A

IN THE SUPREME COURT OF VIRGINIA
AT RICHMOND

JAMES N. FLEMING,

Appellant

v.

W. BEDFORD MOORE, III,

Appellee

Record No. 85-0622

PETITION FOR APPEAL

August 13, 1985

Pages 1, 2, 3 and 4

To The Honorable Chief Justice and
The Justices of the Supreme Court of Virginia:

I. NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW

This appeal arises out of a libel claim by W. Bedford Moore, III ("Moore") concerning a 1976 newspaper advertisement placed by James N. Fleming ("Fleming"). That claim has generated two trials, two previous appeals to this Court, and a remittitur hearing. Fleming seeks this appeal to correct the trial court's failure at the remittitur hearing to follow this Court's mandate to reduce the jury award substantially.

This Court is well familiar with the appellate history of this case. The first trial of this matter resulted in a jury verdict in favor of Moore for $10,000 compensatory damages and $100,000 punitive damages. On March 6, 1981, the judgment of the Circuit Court of Albemarle County was reversed and remanded for a new trial consistent with this Court's opinion. Fleming v. Moore, 221 Va. 884, 275 S.E.2d 632 (1981) ("Fleming I").

The second trial took place on October 21-22, 1983. The jury returned a verdict in favor of Moore for $100,000 compensatory damages, $250,000 punitive damages, and interest on the $250,000 award at the rate of 12% per year beginning on the date of the advertisement's publication, January 16, 1976 (Tr. 608).[1]

On February 1, 1985, this Court affirmed the findings of compensatory and punitive liability against Fleming. This Court further held, however, that both the compensatory and punitive awards were excessive, and ordered the trial court to reduce those awards substantially. Fleming v. Moore, decided sub nom. Gazette, Inc. v. Harris, 229 V.R.R. 783, 846-47, 850-52, 325 S.E.2d 713,

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[1] Appellant will refer to the second Fleming jury trial transcript as "(Tr. ___)," to the transcript of the remittitur hearing as "(Remit. Tr. ___)," to Moore's exhibits as "(PX __)," and to his own exhibits as ("DX ___)."

cert. denied, 53 U.S.L.W. 3895 (U.S. June 24, 1985) (No. 84-1740) ("Fleming II").

The Circuit Court of Albemarle County held a remittitur hearing on April 16, 1985. The trial court ordered:

> Moore shall submit to a new trial on the issue of damages only or shall remit one-third of the compensatory damage award of $100,000 and one-third of the punitive damage award of $250,000, resulting in a compensatory damage award of $66,666.67 and a punitive damage award of $166,666.67. Plaintiff's request for the award of prejudgment interest on the resulting compensatory damage award is denied.

Final Judgment Order at 2. Moore accepted the trial court's remittitur without protest or exception. Id. at 2.

The trial court entered its Final Judgment Order on May 13, 1985. Fleming noted his appeal on the same day.

II. ASSIGNMENTS OF ERROR

A. The trial court failed to remit the compensatory and punitive awards to amounts that are not excessive as a matter of law.

B. The trial court failed to comply with the Fleming II mandate.

III. QUESTIONS PRESENTED

A. Whether the remitted compensatory and punitive awards remain excessive as a matter of law (Assignment of Error A).

B. Whether the trial court violated the Fleming II mandate by not remitting the compensatory and punitive awards substantially (Assignment of Error B). . .